U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 July 2003

BALCA Case No.: **2002-INA-181**
ETA Case No.: P2000-NY-02438257

In the Matter of:

MARY MINDEL,
Employer,

on behalf of

MARIANNA CUDNIK,
Alien.

Appearance: Seymour Magier, Esquire
New York, NY

Certifying Officer: Dolores Dehaan
New York, NY

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Marianna Cudnik ("Alien") filed by Mary Mindel ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of

performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On December 26, 1997, the Employer, Mary Mindel, filed an application for labor certification to enable the Alien, Marianna Cudnik, to fill the position of "Live-in Cook," which was classified by the Job Service as "Cook (Household) Live-in" under the Dictionary of Occupational Titles (hereinafter "D.O.T.") 305.281-010 (AF 20). The job duties for the position, as stated on the application, are as follows:

> Plan menu and cook meals. Peel, wash, trim, prepare vegetables and meats and fish for cooking. Cook vegetables, bake, cook meat an[d] fish as required. Clean kitchen and cooking utensils. Prepare menu from own or established recipes. Do necessary shopping for all items. Must be able to operate all kitchen utensils. Prepare dishes

such as Pirogen, Blintzes, Potato Latkes, Slishkes, Goulash, Stuffed Cabbage, Borscht, Stuff Pepper, Brisket, etc.

(AF 20). The only stated requirement for the position is two years of experience in the job offered (AF 20).

In a Notice of Findings ("NOF") issued on October 5, 2001, the CO proposed to deny certification on the following grounds: 1) the "live-in" requirement is unduly restrictive under the provisions of §656.21(b)(2)(i); 2) the job opportunity is not clearly open to U.S. workers, as required in §656.20(c)(8); and 3) the specialized ethnic/religious requirement is unduly restrictive under §656.21(b)(2). (AF 39-43). Employer submitted its rebuttal thereto on or about November 8, 2001 (AF 44-52). The CO found the rebuttal unpersuasive and issued a Final Determination, dated February 5, 2002, denying certification on the above grounds. (AF 53-54). On or about March 6, 2002, the Employer filed a Request for Review of the denial of labor certification. (AF 55-56). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated May 17, 2002, the Employer submitted its Statement of Position.

DISCUSSION

Under 20 C.F.R. §656.21(b)(2)(i), a job requirement which exceeds that which is normally required for the performance of the job in the United States and as defined for the job in the D.O.T. is presumed to be unduly restrictive. The presumption may be overcome if the employer adequately documents that it arises from business necessity. Similarly, 20 C.F.R. §656.21(b)(2)(iii) specifically provides that "[i]f the job opportunity involves a requirement that the worker live on the employer's premises, the employer shall document adequately that the requirement is a business necessity."

In the present case, the job opening is for a domestic cook, as listed under D.O.T. 305.281-

010. (AF 20). The job entails various cooking and related duties in a private household. The Specific Vocational Preparation (hereinafter "SVP") for that occupation is "6" (over 1 year up to and including 2 years). Thus, a requirement of two years of cooking experience is not unduly restrictive. However, the requirements that the cook "live-in" and have experience cooking various ethnic foods are **not** included in the D.O.T. Furthermore, as outlined above, there is a specific regulatory provision which expressly states that an employer must document the business necessity for a live-in requirement. Accordingly, absent a showing of business necessity, the above-stated requirements are both unduly restrictive. *See* 20 C.F.R. 656.21(b)(2)(i), (iii).

I. Live-In Requirement

In the NOF (AF 39-43), the CO cited §656.21(b)(2)(i),[1] stated the live-in requirement is unduly restrictive, and provided specific instructions to the Employer regarding how she could rebut the CO's finding. The CO stated, in pertinent part:

> The requirement is unduly restrictive unless supported by evidence of business necessity. The circumstances of your household indicated in the application do not appear to justify the need for a live-in worker.
>
> The hours which you are requiring are restrictive and unrealistic for the duties you have outlined. It appears that those duties could be performed by a live-out worker during a normal live-out work schedule, i.e., 9:00 AM to 5:00 PM or 8:00 AM to 4:00 PM.
>
> Employer has not adequately documented the business necessity for the live-in requirement. Employer states that she is a single individual who works 60 hours per

[1] Although it would have been preferable for the CO to cite subsection (iii) as well, her failure to do so constitutes harmless error, since the standard (*i.e.*, documenting the requirement arises from business necessity) is the same.

week. Therefore it does not appear the need for a live-in domestic cook is necessary in light of the fact that employer is away from home most of the day.

You may rebut this finding by:

a. Amending the application to delete the restrictive requirement; or,

b. Submitting evidence that the requirement arise from a business necessity rather than employer preference or convenience. To establish business necessity under 656(b)(2)(1), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner. The evidence you submitted regarding business necessity for the live-in requirement was not sufficient.

Please provide your specific entertainment and/or volunteer work schedule for the past twelve months, giving details, i.e., names, dates, places.

(AF 42).

In her rebuttal (AF 44-52), the Employer provided information which, at best, suggests the possibility that there may be a bona fide job opportunity for a "Cook" position. However, the Employer clearly failed to establish a business necessity for the live-in requirement. To the contrary, in her rebuttal letter, dated November 6, 2001, the Employer acknowledged that: there are no children in the household; she is the only one who resides in the household; she has no special dietary requirement; she works a regular schedule (*i.e.,* 7:00 A.M. to 7:00 P.M. Monday through Friday); and she does not require a live-in cook for business entertainment. To the contrary, the Employer simply wants a live-in cook, because she has a busy schedule and would like someone to prepare 18 meals for her, as well as a Friday night (*i.e.,* Sabbath) dinner for her and her family, ranging from 4 to 10 people. (AF 48-50).

As stated by the CO in the Final Determination:

> The fact that employer is out of the home from 7:00 a.m. to 7:00 p.m. does not in itself justify the need for a Live-In Cook. Employer states in rebuttal that the live-in requirement is not based on an "entertainment need" or schedule and therefore she did not provide an entertainment schedule as outlined in the Notice of Findings. The live-in requirement is not for business entertainment but for herself and normal family Sabbath and holiday meals. This fails to document business necessity for the live-in requirement.

(AF 53). We agree.

In order to establish "business necessity," an employer must demonstrate that the job requirements: (1) bear a reasonable relationship to the occupation in the context of the employer's business; and, (2) are essential to perform, in a reasonable manner, the job duties as a described by the employer. *See Information Industries*, 1988-INA-82(Feb. 9, 1989)(*en banc*). "In the context of a domestic live-in worker, the relevant 'business' is the 'business' of running a household or managing one's personal affairs." *Nandita Chowdhury*, 1993-INA-181 (Apr. 19, 1984), citing *Marion Graham*, 1988-INA-102 (Feb. 2, 1990). In *Marion Graham*, we set forth various pertinent factors in making this determination, such as employer's occupation or commercial activities outside the home, the circumstances of the home itself, and other extenuating circumstances, weighed on a case-by-case basis. Documentation must be sufficient for the CO to determine whether there are cost-effective alternatives to a live-in worker and whether the needs of the household for a live-in worker are genuine. *See, e.g.*, *Maria L. Francisco*, 1994-INA-456 (Oct. 13, 1995); *Richard Esposito*, 1989-INA-222 (Feb. 19, 1991).

As outlined above, the Employer has not established any business necessity whatsoever. She has simply established a preference for a live-in cook to prepare her meals, and a family meal for the Sabbath. A live-out worker could prepare the meals and they could be heated upon the Employer's

return from work. *See, e.g., Nandita Chowdhury, supra.* Accordingly, we affirm the CO's denial of certification based upon the Employer's failure to establish the business necessity for the live-in requirement.

II. Ethnic/Religious Cooking Requirement

As stated above, the CO found in the NOF that the specialized ethnic/religious requirement is unduly restrictive under §656.21(b)(2). Accordingly, the CO directed the Employer to establish that the requirement arises from business necessity. (AF 40).

We hold that the Employer's listing of specific ethnic foods is as unduly restrictive within the meaning of the regulations as specifying an ethnic cooking specialization. Therefore, the Employer's requirement, as incorporated in the job duties, that U.S. applicants have two years experience preparing "dishes such as Pirogen, Blintzes, Potato Latkes, Slishkes, Goulash, Stuffed Cabbage, Borscht, Stuff Pepper, Brisket, etc." is unduly restrictive, absent a showing of business necessity.[2]

Although CO may have misidentified the above-listed dishes as "Polish style" rather than "Jewish-Eastern European-style" cooking, we find that the Employer received adequate notice in the NOF of the foregoing deficiency. (AF 40; *Compare* AF 13-14). Since the Employer failed to address this issue on rebuttal, we also affirm the CO's denial of certification on that basis. (AF 53).[3]

[2] In conjunction with the Request For Review, the Employer argued that there is no "Ethnic Specialty Cook" requirement, and submitted copies of various other labor certifications in support of its position. (AF 79). However, unlike the application herein, none of the above-referred labor certification applications contained a list of ethnic foods. (AF 20; *Compare* 58,60,62,64,66).

[3] In view of our findings regarding the foregoing issues, we need not address the other deficiency cited by the CO.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.